Shell, which has an approved interconnection agreement and an approved local exchange service tariff,[35] plans to offer both residential and business local exchange service in Louisiana.[36] Moreover, Wright describes the entry plans of numerous other prospective CLECs such as Entergy/Hyperion[37] and KMC[38] whose requests for interconnection and access, when implemented, will meet the requirements of Section 271(c)(1)(A). Wright does not, however, offer any evidence that any CLEC has started to actually provide predominantly facilities-based local service to residential customers.

There can be no serious question, then, that "qualifying requests" have indeed been made and that Louisiana is in the "ramp up" period. BellSouth does not allege that any CLEC has negotiated in bad faith or has failed to abide by its implementation schedule, to the extent they are bound by one pursuant to an interconnection agreement. Although BellSouth tries to show that ACSI may be delaying its entry into the residential market to hold up Section 271 approval,[39] it makes no such assertions with regard to Shell, Entergy/Hyperion or KMC. At the very least, therefore, the combination of these CLECs meets the Commission's qualifying request standard.

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[35] See id. at ¶¶ 42-43.

[36] See id. at ¶¶ 43-45.

[37] See id. at ¶¶ 70-71.

[38] See id. at ¶¶ 36-41.

[39] See BellSouth Br. at 18.

C. The Qualifying Requests Foreclose the Availability of Track B.

The fact that these requests have been made is sufficient to foreclose Track B to BellSouth. In fact, the Commission should deny this application, as it did SBC's Oklahoma application, based solely on the finding that BellSouth is in the ramp-up period.

BellSouth persists in its untenable interpretation of Section 271 that would require that a qualifying request for interconnection be made by a CLEC already in operation.[40] As BellSouth notes, the Commission has already rejected this argument, leaving the BOC to have to try its luck in the D.C. Circuit. Until the D.C. Circuit rules on BellSouth's objections, there is really nothing for the Commission to consider here. In any case, Sprint is confident that the Court of Appeals will affirm the Commission's ruling that "the legislative history surrounding section 271(c)(1)(A) establishes that, consistent with its goal of developing competition, Congress intended Track A to be the primary vehicle for BOC entry in section 271."[41] Further, insisting that most (if not all) Section 271 applications be measured under Track A would "further Congress' goal of introducing competition in the local exchange market by giving the BOCs an incentive to cooperate with potential

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[40] See BellSouth Br. at 21.

[41] Oklahoma Order at ¶ 41.

competitors in providing them the facilities they need to fulfill their requests for access and interconnection.[42]

BellSouth also notes that Track B "might" be available under the Commission's ruling if there is no CLEC taking reasonable steps toward becoming operational.[43] Sprint does not understand BellSouth to have put forth an argument that this fact holds in Louisiana; indeed, as explained, it has described considerable activity is underway toward that goal. Thus, under applicable law, Track B is unavailable to BellSouth.

II. BELLSOUTH'S APPLICATION IS INSUFFICIENT ON ITS FACE TO MEET THE REQUIREMENTS OF SECTION 271(c)(2), THE COMPETITIVE CHECKLIST.

Section 271(c)(2) requires that a BOC applicant meet "each" of the checklist requirements regardless of whether its application is reviewed under Track A or Track B.[44] The failure to meet the requirements of *any* checklist item is fatal to a Section 271 application. As explained below, BellSouth has clearly failed to meet several checklist requirements. Based on this fact alone, the Commission should reject this application.

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[42] See id. at ¶ 27 (explaining why a "qualifying request" may come from a potential provider of competitive local service and need not come from an operational carrier).

[43] See BellSouth Br. at 21-22.

[44] Under Track A, a BOC must "provide" all of the checklist services while under Track B the BOC must "offer" each of the checklist services. See 47 U.S.C. § 271(c)(2).

A. The Commission Has The Authority And The Obligation To Review Checklist Compliance De Novo In Light Of The BOC's Performance Under Interconnection Agreements.

Section 271(c)(2) requires that a BOC either be providing access and interconnection pursuant to interconnection agreements (Track A) or be generally offering access and interconnection pursuant to an approved SGAT (Track B) *and* that the access and interconnection meet the requirements of the checklist.[45] Section 271(d)(3) requires that the Commission find that these requirements have been met as a condition to granting Section 271 approval.[46] Thus, the Commission is obligated to find that access and interconnection are being provided or offered by the BOC. The statute also places an independent obligation on the Commission to find that such provision/offer complies with the requirements of the checklist.

In its brief, BellSouth argues that the Commission should give deference to the LPSC's decision approving BellSouth's SGAT and related orders.[47] This is incorrect both as a matter of law and policy. While the Commission is required to consult with a state on checklist compliance issues, it is not obligated to defer to state commission findings.[48] As the Commission explained in the Michigan Order, the statute does not include a standard pursuant to which the FCC must review state findings in

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45 See id. at § 271(c)(2)(A).

46 See id. at § 271(d)(3).

47 See BellSouth Br. at 3-5; 22.

48 See 47 U.S.C. § 271(d)(2)(B).

Section 271 proceedings. The Commission, therefore, will grant state findings the deference they are due. As the Commission explained,

> The Commission, therefore, has discretion in each section 271 proceeding to determine what deference the Commission should accord to the state commission's verification in light of the nature and extent of state proceedings to develop a complete record concerning the applicant's compliance with section 271 and the status of local competition.[49]

Thus, the Commission has the independent obligation to make determinations of checklist compliance, and further, it has the authority to determine whether or not to grant any deference to any conclusions reached by the state on these issues.

Here, the conclusions of the LPSC must be scrutinized closely because BellSouth has carefully orchestrated two wholly distinct factual records: one for state consideration and the other for FCC consideration. *There was no mention of PCS nor any hint of its purported relevance before the Louisiana PSC proceeding.* Further, BellSouth indicated during the state proceedings that it was likely to apply for interLATA authority via Track B.[50] Thus, very little information was collected on the activity of CLECs in the state.

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[49] In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, CC Docket No. 97-137, *Memorandum Opinion and Order* at ¶ 30 (rel. Aug. 19, 1997) ("Michigan Order").

[50] See Varner Prefiled Test. at App. C-1 Tab 24 p.14 ("Currently, BellSouth would have to file under Track B because no provider meeting the requirements of Track A exists in Louisiana."); Varner Test. at App. C-1 Tab 63 p.30 ("Thus Track B is the only road open to BellSouth.")

The procedural aspects of the state proceeding must also give pause. The PSC twice reversed the Chief Administrative Law Judge's findings without any explanation for doing so. It also left completely unaddressed evidence demonstrating that whatever the terms of the SGAT, substantial problems in implementation were persisting. Some of the many issues overlooked by the PSC are set forth below.

B. BellSouth Does Not Provide OSS In Accordance With The Commission's Rules.

In its evaluation of BellSouth's Section 271 application in South Carolina, the Justice Department catalogued numerous serious problems with BellSouth's regionwide OSS. Though BellSouth has fixed some of the deficiencies identified by the Department,[51] its OSS for Louisiana continues to be inconsistent with nearly all of the DOJ's requirements. Indeed, Sprint anticipates the Department's evaluation in this docket will be virtually identical to that filed for South Carolina.

While Sprint does not have experience with BellSouth's OSS in Louisiana, it is clear from the state record and the representations made by BellSouth in support of the instant application that it is not close to complying with the Commission's requirements. Moreover, Sprint's experience in

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[51] For example, BellSouth states that its "Quickservice" application for LENS now enables CLECs to determine whether a service change will require dispatch of a technician in order to better estimate the length of time necessary for BellSouth to process an order. See Stacy OSS Aff. at ¶ 47. BellSouth also states that it now returns missed appointments/jeopardies electronically via EDI and LENS. See id. at ¶ 75.

Florida confirms this fact with regard to OSS required to support unbundled loops.

1. BellSouth's OSS Offerings Are Deficient On Their Face.

Several deficiencies in BellSouth's OSS offerings are obvious. First, the Commission has held that BOCs must offer electronic OSS interfaces for UNEs.[52] BellSouth states that electronic interfaces are available for every aspect of OSS, that its interfaces conform to existing industry standards, and that they have been subjected to extensive internal testing.[53] Nevertheless, the availability of electronic ordering for several basic UNEs is quite recent,[54] providing little time for BellSouth and CLECs to test their reliability. Though BellSouth claims that it can assure CLECS the required access to OSS, BellSouth's current interfaces are interim in nature and will be replaced as BellSouth continues to modify its systems.[55]

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[52] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 256 n.1274 and accompanying discussion ("Local Competition Order").

[53] See BellSouth Br. at 26.

[54] See Stacy OSS Aff. for South Carolina at ¶ 58 ("Mechanized service order generation for the main UNEs (loop, port, INP, loop+INP) will be available as of October 6, 1997.")

[55] See BellSouth Br. at 25. As explained by Melissa Closz in her affidavit, attached hereto as Appendix B, it is imperative that these interim interfaces be made permanent in accordance with industry standards. The current and future lack of OSS measures that are consistent across ILEC networks acts as a significant barrier to entry, requiring a CLEC to develop different interfaces for each network with

Second, on a more general level, the Commission requires that OSS functions provided to CLECs are analogous to OSS functions a BOC provides itself: the Commission has stated that the BOC must provide OSS access that is "equal to the level of access that the BOC provides to itself . . . ."[56] BellSouth's Local Exchange Navigation System ("LENS") interface for preordering fails this standard. LENS is used for preordering, among other things, resale service (for which there is a BOC analogue retail service).

LENS is not a "machine-to-machine" (or "application-to-application") interface.[57] In other words, CLEC customer service representatives must input preordering information into the BellSouth OSS via LENS.[58] The customer service representative must then duplicate the same process for the CLEC OSS.[59] In a machine-to-machine interface, the CLEC customer service representative would input preordering information once, into the CLEC OSS. The CLEC OSS would then automatically and seamlessly deliver the information to the BOC OSS. As the Justice Department found in the SBC Oklahoma Section 271 proceeding, requiring the CLEC to input information twice while requiring

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which it intends to interconnect. See Closz Aff. at ¶ 18, 45.

[56] Michigan Order at ¶ 139.

[57] See Stacy OSS Aff. at ¶ 42; Closz Aff. at ¶ 47.

[58] See Closz Aff. at ¶ 47.

[59] See id.

only one such transaction for the BOC "place[s] a competitor at a significant disadvantage."[60] BellSouth is only now developing a machine-to-machine interface for preordering with AT&T.[61] This level of development cannot meet the Commission's requirements for parity of OSS.

Indeed, the requirement that BOCs provide CLECs with equal access to OSS is also violated by BellSouth's failure to offer an integrated preordering and ordering electronic interface. A CLEC can only purchase these services on an integrated basis if it uses LENS for ordering.[62] However, this choice would make little sense since BellSouth offers the industry standard EDI interface for ordering, and the LENS ordering interface "is limited to a subset of the order types and activity types provided by the EDI interface."[63] Although integrated preordering and ordering is not available to CLECs, the functionalities are available on an integrated basis to BellSouth customer service representatives.[64] BellSouth's OSS therefore impermissibly discriminates against

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[60] See DOJ Oklahoma Evaluation, App A. at 75 (explaining that "unlike SBC's retail operations, a competing carrier with its own separate OSSs is forced to manually enter information twice -- once into the SBC interface and a second time into its own OSSs. For high volumes of orders, such double entry would place a competitor at a significant disadvantage by introducing additional costs, delays, and significant human error").

[61] See Stacy OSS Aff. at ¶ 42.

[62] See id. at ¶ 68.

[63] See id. at ¶ 57.

[64] See Closz Aff. at ¶ 48.

CLECs by requiring them to input data in separate form for ordering and preordering.[65] To aggravate the situation, the EDI interface itself is flawed and requires manual intervention by both the CLEC and BellSouth for both simple and complex orders.[66]

LENS exhibits a litany of other material differences from BellSouth's own pre-ordering system that make competing with the incumbent that much more difficult for a CLEC. These additional deficiencies include the following: (1) LENS does not provide the functionality for a CLEC to issue a change order to BellSouth -- such functionality is still under development;[67] (2) LENS does not permit a CLEC to electronically change the features on a customer's current service;[68] (3) LENS does not provide a CLEC with the same "on-line, front-end" edits[69] available to BellSouth.

Finally, BellSouth does not provide its Trouble Analysis and Facilities Interface ("TAFI") on a non-discriminatory basis. BellSouth has identified this interface as the appropriate one to submit problems associated with UNEs. For a CLEC, however, this interface is the functional equivalent of "sending a facsimile

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[65] See id. ("[T]he EDI interface is not integrated with an electronic interface for pre-ordering functions.")

[66] See id.

[67] See id. at ¶ 28.

[68] See id. at ¶ 29.

[69] See id. at ¶ 31. This function checks for errors in pre-order information in order to prevent an erroneous order from being submitted to BellSouth, thus causing order and service delay to the CLEC and its customer.

transmission," since it results in BellSouth employees retrieving the information, and then manually entering it into BellSouth's own system.[70]

2. Sprint's Experience In Florida Shows That BellSouth's OSS Systems For Unbundled Loop Offerings Cannot Support Viable CLEC Entry

BellSouth states that no carrier has actually requested any unbundled loops in Louisiana.[71] BellSouth asserts, however, that it had provisioned 5,882 unbundled loops elsewhere in its nine state region by September 30[72] and that it uses the same OSS systems across its region.[73] BellSouth further claims that at least 98 percent of its unbundled loops have been cut-over to CLECs within 15 minutes.[74] The BOC claims that this track record demonstrates compliance with the unbundled loop checklist obligation.

Like so much else in the BellSouth application, these assertions are misleading. As an initial matter, BellSouth's claim that it cuts-over unbundled loops 98 percent of the time within 15 minutes is based on a limited study of cutover results for *one* CLEC in Georgia.[75] Moreover, Sprint's experience in

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70 Id. at ¶ 32.

71 See BellSouth Br. at 51; Milner Aff. at ¶ 37.

72 See BellSouth Br. at 52.

73 See BellSouth Br. at 39 ("BellSouth uses the same processes with respect to checklist items in all of its nine states . . . .").

74 See BellSouth Br. at 52 (citing Milner Aff. at ¶ 41).

75 See Milner Aff. at ¶ 45.

Florida has been that BellSouth's systems for provisioning unbundled loops are anything but reliable. Sprint recently filed a complaint with the Florida Public Service Commission seeking redress of the problems it has experienced with BellSouth's unbundled loops.[76]

Sprint has experienced problems in virtually all phases of the customer activation (or "cutover") process for unbundled loops.[77] For example, BellSouth has regularly missed its commitment to notify Sprint within 48 hours of an order's receipt if there is a problem with the order.[78] These delays have frequently caused loop installations to be postponed and have caused Sprint to miss due date commitments made to its customers. In some cases, BellSouth has failed to or been unable to cancel disconnect orders for Sprint customers when service conversions have been postponed or delayed. The result is that Sprint customers are left with no service at all. Furthermore, in at least two cases, BellSouth spent *months* sorting out the problems

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[76] The complaint filed with the Florida Commission is attached as Appendix C. On November 3, 1997, BellSouth filed an Answer and Response to Sprint's Complaint in which it merely denied, without explanation, Sprint's allegations. The Florida Commission has not ruled on the complaint.

[77] See Closz Aff. at ¶¶ 59-76. In addition to OSS, the Closz Affidavit describes problems Sprint has had with BellSouth's interim number portability service in Florida. See id. at ¶¶ 79-89.

[78] See Closz Aff. at ¶ 58 (describing by month the percentage of notifications received outside the 48-hour window as varying between 40 and 95 percent between April and September, 1997, and 10 and 16 percent in October and November, respectively).

with its cutover process before Sprint's local customer received service from Sprint.

Sprint has also experienced problems with BellSouth after loops have been cut-over.[79] BellSouth has been unable to provide accurate bills to Sprint for the purchase of unbundled loops. Rate elements have been repeatedly misapplied on bills, requiring Sprint to request adjustments in the bill every month. In addition, BellSouth has in some cases provided fewer loops to a particular customer than Sprint has requested. Sprint customers have also experienced interruptions and degradation in service caused by problems in BellSouth's network.

In sum, BellSouth's systems for unbundled loop offerings are simply insufficient to provide Sprint a meaningful opportunity to compete in the local market in Florida. This experience provides a revealing insight into just how far BellSouth is from complying with its statutory obligations.[80]

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[79] See id. at ¶¶ 77-78.

[80] ACSI testified before the LPSC that it has had similar problems in Georgia with BellSouth's unbundled loop provisioning systems. See Brief of American Communications Services, Inc. at App. C-1 Tab 91 p. 6-7, filed in LPSC Docket No. U-22252 (June 17, 1997); Murphy Testimony, LPSC App. C-1 Tab 70 at 1596-1645 (May 27, 1997). As Riley Murphy testified before the LPSC, in response to the problems experienced with BellSouth's unbundled loops offering in Georgia, "the problems [ACSI] experienced had a chilling effect on our desire to cause any more disruptions to our customers . . . we did have a policy of holding back some of the orders that otherwise would have been processed . . . ." Id. at 1639.

3. BellSouth Still Has Not Provided Adequate Performance Measures.

The Justice Department and the FCC have agreed that "[p]roviding resale services in substantially the same time as analogous retail services is probably the most fundamental parity requirement in Section 251."[81] In the Michigan Order, the FCC stated that "in order to demonstrate nondiscriminatory access to OSS functions, Ameritech must demonstrate that it is provisioning resale orders within the same average installation interval as that achieved by its retail operations."[82] The Ameritech Application relied upon empirical evidence showing due dates not met and installations completed outside of a six-day interval, for both competing carriers and itself. The FCC found this comparison to be insufficient, because "[m]easuring rates of completion within a target period of time rather than determining actual average time to complete a task does not permit direct comparisons to Ameritech's retail performances."[83]

The DOJ relied explicitly upon the Michigan Order in determining that BellSouth's performance measurements submitted in support of its South Carolina application were deficient.

> While BellSouth purports to provide 'data on actual intervals for provisioning various services' . . . an examination of the data cited . . . to that affidavit quickly reveals that is not the case. The charts are clearly labeled 'Issue to Original Due Date Intervals' or 'Issue to Due Date Average Interval.' At best, due date

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[81] DOJ Michigan Evaluation at A-12 (quoted with approval in Michigan Order at ¶ 167).

[82] Michigan Order at ¶ 166 (emphasis added).

[83] Id. at ¶ 165 (citation omitted).

> intervals can show that BellSouth is assigning due dates to CLECs and itself on a non-discriminatory basis. While this is important, this is not the same as an installation interval.[84]

BellSouth submitted studies to support its Louisiana application which relied upon the same deficient "interval" measurement method as that used in South Carolina. In Louisiana, BellSouth has also provided data on the percentage of provisioning appointments met.[85] But this additional information still does not offer regulators and CLECs the opportunity to assess whether BellSouth is provisioning services on a nondiscriminatory basis. For example, the data provided by BellSouth might show the same average due dates and the same percentages of due dates met for CLECs and BellSouth, even though the average provisioning intervals are much longer for CLECs than for BellSouth. The performances data offered in support of the Louisiana application, therefore, offer the kinds of opportunities for masking discriminatory treatment that the Commission has found unacceptable.

Not only are BellSouth's performance measurements insufficient, SMNI has experienced difficulty obtaining information regarding those OSS elements for which BellSouth can provide performance data. In a June 24, 1997 meeting with Sprint, BellSouth stated that "the supporting systems and processes needed to capture and produce the performance

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[84] DOJ South Carolina Evaluation at App. A n.52 (citations omitted).

[85] See Stacy Performance Aff. at ¶ 45.

measurements data were still being developed."[86] BellSouth agreed to report back to Sprint regarding which performance measurements it could produce for Sprint.[87] Rather than doing so, one month later BellSouth referred Sprint back to its negotiating team in order to determine which performance measurements BellSouth would be willing to produce.[88] Thus, "[a]s of November 25, 1997, SMNI has not been provided any information relative to BellSouth's performance in support of the pre-order, ordering, provisioning or maintenance or services purchased from BellSouth [in Florida]."[89]

C. BellSouth Places Unlawful Conditions And Restrictions On The Resale Of Its Services.

Like its flawed application for South Carolina,[90] BellSouth's application for Louisiana does not even attempt to meet the checklist requirements for resale. BellSouth imposes unreasonable limitations on the resale of customer service arrangements ("CSAs") and discriminates impermissibly against resellers that provide their own operator services.

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86 Closz Aff. at ¶ 102.

87 See id. at ¶ 102.

88 See id. at ¶ 102.

89 Id. at ¶ 101.

90 See Motion of AT&T Corp. and LCI International Telecom Corp. To Dismiss BellSouth's 271 Application For South Carolina, CC Dkt. No. 97-208 (filed Oct. 1, 1997). Sprint supports the AT&T/LCI Motion in that proceeding, and believes further that the Commission can and should summarily dismiss both BellSouth applications as facially deficient.

1. BellSouth Imposes Unlawful Conditions On Resellers.

The Commission has stated that the obligation to provide all telecommunications services for resale at a wholesale discount requires that ILECs offer contract arrangements including volume-based discounts at wholesale discounts.[91] The Commission has also stated that ILECs may not restrict resale of volume discount offerings to the customer for whom the ILEC designed the offering.[92] By insisting that CSAs be available for resale at no discount[93] and be offered only to the BellSouth customers for whom the CSA was established,[94] BellSouth has openly violated the resale checklist requirement.[95]

BellSouth attempts to justify its failure here by recharacterizing the availability of CSAs for resale as merely

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91 See Local Competition Order at ¶¶ 948, 951.

92 See id. at ¶ 953.

93 BellSouth Br. at 66.

94 Id. at 67 n.43. In addition, BellSouth does not make any CSAs into which it entered on or before January 25, 1997 available for resale. See Varner Aff. at ¶ 183.

95 In addition, it appears that BellSouth is refusing to permit any resale of promotions offered for 90 days or less. In its first order resolving issues in the BellSouth-AT&T arbitration, the LPSC seemed to follow the FCC rule (see 47 C.F.R. § 51.613(a)(2)) that such promotions must be made available for resale, but not at the wholesale discount applied to the promotional price. See First AT&T Arb. Order at App. C-2 Tab 180 p. 5. But in the second order in that proceeding, the LPSC seemed to agree with BellSouth's position that short-term promotions are not subject to any resale obligations at all. See Second AT&T Arb. Order, App. C-2 Tab 191 p. 3. BellSouth seems to think that the LPSC has excluded short term promotions from *any* resale requirement. See BellSouth Br. at 66; Varner Aff. at ¶ 183.

the State's prerogative "to determine the appropriate discount available to resellers." [96] First, making customer-specific discounts exempt from the wholesale discount cannot be successfully relabelled as the state fulfilling its role of setting the discount. The decision not to investigate the level of avoided costs cannot be equated with an attempt to set the proper wholesale discount.

In any case, as the Eighth Circuit has acknowledged, the FCC has the exclusive jurisdiction under Section 251(c)(4)(B) to establish rules to prevent discriminatory conditions on resale.[97] The Commission adopted its rules governing the resale of CSAs pursuant to Section 251(c)(4)(B).[98] That provision leaves it to the Commission, not the states, to determine whether ILECs must apply the resale discount to CSAs.

BellSouth claims that the full 20.72% discount should not be applied because certain avoided costs, mostly marketing, were not incurred in the lower CSA rates, and thus *no discount at all* should apply. This clearly overstates the case. The FCC has acknowledged that in some cases it may be appropriate for states to adopt service-specific wholesale discounts.[99] But BellSouth does not and cannot argue that there are no avoidable costs when CSAs are offered on a wholesale rather than retail basis. Even

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[96] BellSouth Br. at 67.

[97] See 47 U.S.C. § 251(c)(4)(B); Iowa Utils. Bd. v. FCC, 120 F.3d 753, 794 n.10 (8th Cir. 1997).

[98] See Local Competition Order at ¶¶ 951-953.

[99] See id. at ¶¶ 916, 953.

if BellSouth could prove that some differential treatment is appropriate in the case of certain CSAs, this does not exempt those services from the wholesale discount requirement entirely. It simply means that the state Commission must conduct a cost proceeding to determine the appropriate level of the discount. Until such proceeding has been conducted, the wholesale discount applicable to other services should apply.

Nor is there any basis for BellSouth's astonishing assertion that a resale discount should not be applied to CSAs because such application would cause BellSouth to lose customers and would "interfere with BellSouth's cost recovery under the Louisiana PSC's pricing regime."[100] The LPSC's job in the resale context is to set the level of the discount based on avoidable costs. Resale rules may not be designed to protect BellSouth's market share or to ensure cost recovery. As the FCC has stated, "[t]he language of section 252(d)(3) makes no provision for selecting a wholesale discount rate on policy grounds,"[101] let alone the flawed policy grounds suggested by BellSouth.

2. BellSouth Discriminates Unlawfully Against Resellers That Provide Operator Services.

In the LPSC's resale proceeding, several CLECs stated that they planned to provide resale in combination with their own operator services.[102] The LPSC acknowledged that "[i]t may be

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[100] See BellSouth Br. at 68.

[101] See Local Competition Order at ¶ 914.

[102] See LPSC Resale Order at App. C-4 Tab 329 p. 14.

appropriate to have an additional discount available for companies that provide their own operators,"[103] and sought further comment on the issue. While the LPSC is in the process of considering this critical issue, BellSouth filed its Section 271 application with the FCC.

Until the LPSC has adopted a resale discount applicable to resellers that provide their own operator services, those resellers will be subject to unreasonably discriminatory treatment in violation of Section 251(c)(4)(B). The wholesale discount applicable to a certain carrier must include all of the costs that the ILEC avoids when it provides a retail service on a wholesale basis. A class of resellers (and their customers) to whom this principle is not applied suffers unlawful discrimination. Until the LPSC is given a chance to rectify this problem, BellSouth cannot be considered to have complied with the resale checklist requirement.

D. BellSouth's UNE Prices In Louisiana Are Not Geographically Deaveraged.

In the Michigan Order, the Commission stated that compliance with the checklist requires a BOC to set its prices for interconnection and unbundled elements at geographically deaveraged rates.[104] As the Commission explained,

> Deaveraged rates more closely reflect the actual costs of providing interconnection and unbundled elements. Deaveraging should, therefore, lead to increased competition and ensure that competitors make efficient

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[103] Id.

[104] See Michigan Order at ¶ 292.

> entry decisions about whether they will use unbundled network elements or build facilities.[105]

BellSouth, however, "does not offer deaveraged rates for unbundled network elements."[106] In this regard as well, therefore, BellSouth's application is legally deficient.

E. BellSouth Refuses To Permit CLECs To Combine UNEs To Provide Services BellSouth Offers At Retail.

Although BellSouth's SGAT appears to permit CLECs to recombine UNEs to provide end user services, Sprint and other CLECs have learned that BellSouth insists that the wholesale discount for resold services applies where UNEs are combined to provide end user services provided by the incumbent. The Commission should therefore make clear what BellSouth no doubt already knows: Where a CLEC without any independent facilities of its own purchases and recombines UNEs for the purpose of providing finished services, including finished services provided by the incumbent, federal law mandates that the BOC charge the CLEC the cost-based rates applicable to unbundled elements. Any attempt to apply the resale discount in this context will not only prevent a BOC from receiving Section 271 approval, but will also constitute an independent violation of Section 251(c)(3) and

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105 Id.

106 Varner Aff. at ¶ 31. In her testimony during the LPSC's cost proceeding, the LPSC Staff's expert Kimberly H. Dismukes stated that her independent cost study, upon which the LPSC relied in setting UNE prices, did not even include an analysis of geographically deaveraged UNEs. See Dismukes Test. at App. C-3 Tab 33b at 3091 ("I actually have not done the analysis at this point in terms of what deaveraged [UNE] rates should be or how they would be calculated").

the Commission's rules. Furthermore, the failure of BellSouth to disclose fully its position on UNE combination pricing in its Brief is itself independent and sufficient grounds for dismissal. Given the brevity of the processing period, and the size and significance of the task, the Commission should insist on full disclosure and forthrightness from Section 271 applicants.

1. BellSouth's Position Has Not Been Fully Disclosed in this Proceeding.

BellSouth's SGAT states that "[a] requesting carrier is entitled to gain access to all of the unbundled elements that when combined by the requesting carrier are sufficient to enable the requesting carrier to provide telecommunications service."[107] BellSouth did not attempt to qualify this position in its brief in support of its application. While its brief does disclose its position that a "precombined, 'switch-as-is'" order for UNEs will be provided only at the wholesale discount,[108] it does not come forward to explain that BellSouth has insisted the very same rate apply *even where the CLEC performs the combining.* The brief simply states in the context of a discussion of precombined UNEs that the authority to approve pricing of UNEs and resale services falls within the "exclusive jurisdiction" of the LPSC.[109]

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[107] See SGAT at § II.F.

[108] BellSouth Br. at 44.

[109] See id. at 45.

In a recent letter to Melissa Closz, Sprint Communications Company L.P.'s Director-Local Market Development, however, BellSouth stated as follows:

> [W]hen Sprint Communications orders a combination of UNEs or orders individual UNEs that, when combined, duplicate a retail service, BellSouth will treat these orders for the purposes of billing and provisioning, as resale.[110]

BellSouth has taken a similar position in letters to LCI[111] and AT&T.[112] In addition, the BellSouth-AT&T interconnection agreement contains a similar restriction.[113]

2. BellSouth's Position Is Unlawful.

There is no legal basis for BellSouth's position on recombined UNEs. Subsection 251(c)(3) allows "any requesting

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110 See Letter from Pat Finlen, BellSouth Telecommunications, Inc. Manager, Interconnection Services to Melissa Closz, Sprint Communications L.P.'s Director, Local Market Development (Nov. 4, 1997) (attached at App. D).

111 See Letter from Fred Monacelli, Sales Assistant Vice President, BellSouth Interconnection Services to Anne K. Bingaman, Sr. Vice President, LCI (Oct. 7, 1997) (attached at App. D). The letter was initially submitted by LCI to the FCC in the BellSouth South Carolina 271 proceeding, CC Docket No. 97-208.

112 See Letter from Mark Feidler, BellSouth Telecommunications, Inc., President-Interconnection Services, to W.J. Carroll (Sept. 12, 1997) (attached at App. D). The letter was initially submitted by AT&T to the FCC in the BellSouth South Carolina 271 proceeding, CC Docket No. 97-208.

113 See BellSouth-AT&T Interconnection Agreement at 1.A ("When AT&T recombines unbundled Network Elements to create services identical to BellSouth's retail offerings, the prices charged to AT&T for the rebundled services shall be computed at BellSouth's retail price less the wholesale discount established by the Louisiana Public Service Commission in Order U-22020 or any future modifications thereof and offered under the same terms and conditions as BellSouth offers the service").

telecommunications carrier" to lease UNEs to provide "a telecommunications service," and imposes a duty upon ILECs to provide "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."[114] That provision further requires that the cost-based rate established for UNEs pursuant to Section 252(d)(1) apply where UNEs are used to provide telecommunications services.[115] Resold services, on the other hand, are to be priced at the retail rate less a discount.[116]

Nothing in the statute indicates that the resale discount would apply where the requesting carrier uses recombined UNEs to provide services already provided by the incumbent. Such a restriction would permit CLECs without their own independent facilities to use recombined UNEs to provide only the narrow set of services not provided by the incumbent. Stated another way, such a restriction would in most cases require a requesting carrier to combine UNEs with its own independent facilities in order to qualify for the UNE cost-based rate.

But the Eighth Circuit has explicitly rejected such a distorted interpretation of Section 251(c)(3). In Iowa Utils. Bd. v. FCC, the Eighth Circuit confirmed that requesting carriers may combine UNEs to provide finished services.[117] The Court also

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114 47 U.S.C. § 251(c)(3).

115 Id. at § 252(d)(1).

116 Id. at § 252(d)(3).

117 See Iowa Utils. Bd. v. FCC, 120 F.3d at 814-815 (8th Cir. 1997).

emphasized that Section 251(c)(3) "imposes a duty on incumbent LECs to provide unbundled access 'to *any* requesting telecommunications carrier for the provision of a telecommunications service.'"[118] The Court concluded that "*any* requesting telecommunications carrier" includes carriers that rely exclusively on UNEs to provide finished services.[119] As the Court found, this logic mandates that such finished services include those already provided by the incumbent.

Indeed, the Eighth Circuit also explicitly rejected the argument, implicit in BellSouth's letters to CLECs, that permitting carriers to provide the same services via leased UNEs and resale eviscerates the distinction between the two. Consistent with accepted principles of statutory construction,[120] the Court found that the UNE section -- 251(c)(3) -- poses greater risks and offers greater opportunities for requesting carriers and is therefore quite different from the resale section -- 251(c)(4).[121]

Nor could BellSouth fall back on the statement in its brief that this is simply a pricing issue subject to the exclusive jurisdiction of the states. In finding that the FCC has jurisdiction to define UNEs and in upholding the FCC's rules

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118 Id. at 814 (emphasis in original) (citation omitted).

119 See id.

120 "[T]he entire act must be read together because no part of the act is superior to any other part." Sutherland Stat Const § 47.02 -- (5th Ed) (citation omitted).

121 See Iowa Utils. Bd. v. FCC, 753 F.3d at 815.